United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
LEON H. TYKULSKER

75-7608

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY AND JACK NASH

GUGGENHEIMER & UNTERMYER
80 Pine Street
New York, N.Y. 10005
(212) 344-2040
Attorneys for
Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash, Defendants-Appellants

LEON H. TYKULSKER
RICHARD P. ACKERMAN
Of Counsel

Bp/s

6

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

<u>Statutes and Rules</u>: Page

<u>Other Authorities</u>:

POINT I

Plaintiffs-Appellees Have Failed To Establish That The Cost Of Identifying Class Members May Be Charged To Anyone Other Than Plaintiffs

A. Plaintiffs Must Bear The Cost Of Identification Of Class Members As An Inherent Part Of The Notice Procedure.

Plaintiffs do not cite any decision since "Eisen IV", Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which holds that the cost of notice, in whole or in part, is to be borne by defendants in a class action. Nor do plaintiffs refer to any authority establishing that the cost of identifying class members is not an integral part of the cost of notice. Despite the Supreme Court's ruling in Eisen IV and subsequent lower court decisions, plaintiffs still contend that defendants are and should be required to bear what here amounts to more than 75% of the aggregate cost of notice to class members. Their contentions should be rejected, since, as set forth in the Main Brief of Oppenheimer Defendants at 22-27,* the cost of identifying members of the class must be borne by the plaintiffs, as a matter of law.

Plaintiffs attempt, without success, to distinguish a few of the cases cited by defendants on this point. (Pltf. Br. at 62-64.)** Thus, for example, plaintiffs cite with

---

* Reference is to Brief of Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.

** Brief of Plaintiffs-Appellees will be so referred to.

approval the allocation of identification costs to defendants in Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969), but that is now clearly improper and irrelevant to this appeal, in view of the intervening decisions in Eisen IV and "Eisen III", Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). However, the determination of the Court in Berland that class identification is part of class notification under Rule 23 remains sound authority.

In B & B Investment Club v. Kleinert's Inc., CCH Fed. Sec. L. Rep. ¶ 94,451 at pp. 95,571-73 (E.D. Pa. 1974), the Court did not remotely suggest, by reference to Berland v. Mack or otherwise, that the cost of class identification should be borne by defendants, as plaintiffs indicate (Pltf. Br. at 64.) In fact, the Court there ordered "plaintiffs to present the Court with their proposal on how to identify the class members and the cost involved in notice and their ability and willingness to meet those requirements."

Plaintiff would distinguish State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969), on the ground that the plaintiffs there had in their possession the raw data from which to identify class members. (Pltf. Br. at 64.) But possession of the data is not relevant, since in the instant case defendants have in effect granted plaintiffs access to the computer tapes containing the names and addresses of the members of plaintiffs' class. What is significant is that plaintiffs there were required to bear

whatever costs were involved in obtaining names and addresses from such data, as they should here.

Plaintiffs' Brief (at 62) cites Popkin v. Wheelabrator-Frye, Inc., CCH Fed. Sec. L. Rep. ¶ 95,068 at p. 97,748 (S.D.N.Y. 1975), in support of plaintiffs' conclusion that the defendants may be required to bear the cost of identifying the members of the class. No such support is afforded by the decision in Popkin, which held that the costs of notice should not be borne by the corporate defendant, because, among other things, of the difficulties of obtaining reimbursement if it should prevail.*

Thus, as set forth in our Main Brief at pp. 22-27, as a matter of law, the District Court erred in determining that the defendant Fund should bear so much of the cost of notice as relates to identifying the members of the class herein.

B. Defendants Are Not Responsible For Causing Identification Costs To Be Incurred.

Plaintiffs' main argument in support of the allocation of the identification portion of notice costs is premised upon their application to have the Court redefine the class in accordance with plaintiffs' amended views, namely to limit the class to all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund.

---

* In addition to the practical difficulties of collection, Pltf. Br., at 1st footnote on p. 59, indicates that such costs may not be taxable against plaintiffs even if defendants should prevail.

Plaintiffs concede that their new class definition was proposed by them primarily to eliminate identification costs.* This would be accomplished only if the Court had adopted plaintiffs' further proposal that notice should be sent to all current shareholders in a regular Fund mailing, irrespective of whether such shareholders were class members. The defendants opposed the definition of the class sought by the plaintiffs in the context of opposing plaintiffs' proposal of a broadside mailing, because such a mailing would be prejudicial to the Fund, and not, as plaintiffs suggest, because it would limit the res judicata effect of this action.

As set forth in our Main Brief (at 33), the Court below had before it facts establishing the very real possibility that a broadside mailing could readily trigger a wave of redemptions with consequent injury to the Fund, by reason of, among other things, forced sale of Fund assets. The Court refused to authorize a mailing which had this potential for

---

* Pltf. Br. at 50. Plaintiffs' claims that such redefinition would also facilitate distribution of any recovery and simplify issues are fallacious. If ever ultimately there is a recovery, distribution to such class members will require the same process of determining who purchased Fund shares during the relevant period, plus the additional expense of determining which of those purchasers was a shareholder at the time the class notice was sent. By simplification of issues, plaintiffs presumably refer to defendants' rights of set-off against class members who had obtained the benefits of alleged overvaluation on redemption of their shares (Pltf. Br. at 110.) But those issues would remain, since a considerable number of current shareholders, including Taussig, one of the plaintiffs herein, from time to time redeemed some but not all of their shares during the relevant period.

damage. It should be borne in mind that such a mailing would not be limited to a few incidental non-class members. On the contrary, even in 1973, approximately 68,000, or more than 40% of all shareholder accounts, were not members of the class. (See Main Brief of Oppenheimer Defendants, fn. at 32.)

Counsel for plaintiffs here and in the Court below attempt to minimize the possibilities of harm from the broadside mailing on the ground that shareholders have been advised of this litigation in prospectuses, annual reports and proxy statements. However, the impact of a separately printed class action notice on skittish stockholders is a far cry from that of a brief paragraph description of litigation contained in a comprehensive document devoted to other matters. Courts have rightly been sensitive to the impact of class notices sent out under their aegis. See, for example, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), where the Court stated (at 501):

> "[T]he notice provisions themselves may prove harmful to defendants since the attendant publicity and its official source may inflate the apparent importance of the action. [Citations omitted.] So much of the stock market depends upon faith and reputation that the Court should be reluctant to lend its weight to any unnecessary publicity in connection with a pending law suit." (Emphasis supplied.)

Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971), does not hold to the contrary. That case did not involve an open-end mutual fund, as does the instant case, where stockholders may redeem at any time. Accordingly, the risk of harm to the corporation and its stockholders was virtually absent, especially as the company there had previously called

the stockholders' attention to the litigation by a separately printed document -- namely, a letter from the president.

Moreover, the method of notice advanced by plaintiffs does not satisfy the express requirements of Rule 23(c)(2) that "the best notice practicable", including individual notice shall be directed "to all members who can be identified through reasonable effort." We know of no court in recent years that has required that notice be sent in a manner that would include a substantial number of nonclass members, where the class members could be identified. Main Brief of Oppenheimer Defendants at 34. Not only must the notice meet due process requirements, but in determining the "best notice", courts properly should be concerned to avoid unnecessary risk of harm to defendants. This comports fully with the Advisory Committee Notes to Rule 23, 39 F.R.C. 69, at 107, which state that notice is to be employed "for the fair conduct of the action" and not only for the protection of class members.

Plaintiffs appear to rely chiefly upon Berland v. Mack, 48 F.R.D. 121, 126 (S.D.N.Y. 1969), in support of their assertion that notice may properly be sent to nonclass members as well as class members. The Berland court did not so hold. There, the class was composed of persons who acquired shares of defendant corporation between March 21, 1966 and April 29, 1966. On April 29, 1966, trading in the stock was suspended by the SEC for a six-month period. In order to cover purchasers at the end of the period where there had been delays in

transfer, the court ordered individual notice by mail to all transferees of record for the period from March 21, 1966 to May 13, 1966. Because of the suspension of trading, shareholders who were not class members did not receive notice of the action. In fact, the opinion clearly evinces the Court's concern that notice of the action be sent only to class members.

Nor do the other cases cited by plaintiffs support their contention that where the members of a class can be identified, notice may be directed to nonclass as well as class members. (Pltf. Br. at 53-54.) Eisen III and Eisen IV do not intimate that this suggested procedure would be satisfactory. Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950), merely recognizes the insufficiency of notice by publication of a trust accounting where the names and addresses of the beneficiaries are known to the trustee, and, so, is inapposite here. In Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971), there is no indication that notice was sent to shareholders of the defendant who were not also class members. Thus, the case is not pertinent to the question of harm present herein, resulting from receipt of Rule 23 notice by a substantial number of shareholders who are not members of the class. Similarly, plaintiffs' cite Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971) (class composed of credit card holders and not shareholders); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968) (court did not

authorize use of corporate mailing); Popkin v. Wheelabrator-Frye, Inc., CCH Fed. Sec. L. Rep. ¶ 95,068 (S.D.N.Y. 1975). In none of these cases did the Court authorize use of a regular corporate mailing to disseminate notice of the class action to a substantial body of stockholders who were not class members.*

Plaintiffs' reliance upon In re Antibiotic Antitrust Actions, 333 F. Supp. 291 (S.D.N.Y. 1971), is misplaced. In the Antibiotic actions the class consisted of all persons who purchased antibiotic drugs from hospitals and retail outlets within the state during a twelve-year period. Thus, unlike the instant case, the class members could not be identified, and therefore the trial court was authorized to devise an alternative manner of communicating notice. The Court there directed notice by mail to certain residents of the state who had been selected at random from mailing lists in plaintiffs' possession, and apparently at plaintiffs' expense. However, again in contrast to the instant case, this method of notice did not present either a substantial or an avoidable risk of prejudice to the Antibiotic defendants. Unlike shareholders of a mutual fund, consumers of antibiotic drugs constitute a captive market, and there was little possibility that non-

---

* Pltf. Br. at 54 cites Justice Douglas' dissenting and concurring opinion in Eisen IV, fn. 1 at p. 180, on this point. Aside from the fact that his views did not prevail, the footnote is obscure, and in any case did not involve a corporate mailing to stockholders with the attendant risk of injury to the company.

class members who received notice of the Antibiotic actions would be dissuaded from future purchases.

Fisher v. Kletz, 41 F.R.D. 377, 384-86 (S.D.N.Y. 1966), cited in Pltf. Br., fn. at 58, in fact held that in view of pending discovery proceedings and other pretrial matters, notification of the class was premature, without addressing the question whether Rule 23(c)(2) requires identification of class members prior to sending notice.

Plaintiffs also seek to sustain the allocation of notice costs on the basis of the somewhat cryptic reference in one of the concluding paragraphs of Eisen IV, 417 U.S. 156, 178-79, that:

> "The usual rule is that a plaintiff must initially bear the cost of notice to the class. The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit.15/ Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."

Footnote fifteen, which annotates this passage, states:

> "See, e.g., Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (EDNY 1968). We, of course, express no opinion on the proper allocation of cost of notice in such cases."

In the two-year period which has elapsed since the Eisen IV decision, no court has availed itself of this language to impose any part of the cost of notice upon defendants in a class action.

If in that footnote the Supreme Court did authorize an exception, the standards therefor are certainly not those

which the plaintiffs assert. Context and analysis support the inference that the Supreme Court's reference to Dolgow (43 F.R.D. 472, 498-500) pertains to that portion of the Dolgow opinion which speaks to the "fiduciary duty owed to purchasers of stock by the corporation and the selling directors, officers, and other insiders."

Plaintiffs claim that by reason of this reference to Dolgow a trial court may also consider (1) the ability to bear the cost and (2) the advantage to the corporation of a judgment with res judicata effect. Manifestly, this is impermissible.

First, the Supreme Court has unequivocally ruled that the relative financial capabilities of the parties are not relevant to a determination as to the allocation of notice costs. Eisen IV, supra at 176. Any language to the contrary in Dolgow has been superseded.

Secondly, plaintiffs urge that the trial court may consider the advantage to the defendant of a judgment with broader res judicata effect. It is submitted that, prior to a determination on the merits, the prospect of the enhanced res judicata effect of a broad class definition affords very cold comfort indeed to the typical class action defendant who must conduct his case in light of an increased exposure to liability. The defendants herein do not seek such res judicata benefits. On the contrary, in the Court below defendants actively sought a more restricted class definition based on a much shorter class period; one which would have limited membership to

persons who purchased shares from March 28, 1968 to April 25, 1969. The authorized class period, March 28, 1968 to April 24, 1970, is of plaintiffs' devising and was proposed by them. It is thus unreasonable to infer that defendants' opposition to plaintiffs proposed redefinition was founded upon an anticipated diminution in the res judicata effect. As previously indicated,* defendants opposed plaintiffs' proposal for redefinition in the context of resisting the prejudicial effect of plaintiffs' furtner proposal for a broadside mailing to all shareholders of the Fund.

Lastly, plaintiffs suggest that the Supreme Court's reference to "situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit" has some application to the instant case. Since Rule 23(c)(2) has no application to derivative suits, presumably the Supreme Court may have had in mind class actions predicated on fraud, self-dealing or other oppressive breach of fiduciary obligations typical of derivative actions. No such violations are charged in the instant complaints, the gravamen of which are that the values established for restricted securities by the Fund's board of directors were erroneously high. No court since Eisen IV has found that allegations of this sort in shareholder class actions constitute an appropriate exception to the general rule articulated by the Supreme Court

---

* See pp. 4-5, supra; Main Brief of Oppenheimer Defendants at 31-35; A-138.

that plaintiffs must bear all notice costs.

Plaintiffs seek to impose upon the defendants more than 75% of the costs which must necessarily be incurred in furnishing individual notice of the class action to class members who can be identified with reasonable effort. The injustice of this allocation is even more severe if, as plaintiffs state,* this cost is not taxable against plaintiffs should defendants prevail on the merits. Moreover, the allocation of notice costs is contrary to the holdings in Eisen III and Eisen IV that a defendant may not be compelled to finance a law suit against itself.

C. If Discovery Were Applicable, The Cost Of Identifying Class Members Is Properly Chargeable To Plaintiffs.

The identification of class members herein does not arise under the federal pretrial discovery rules. As indicated, defendants assert that this process of identification is part of the notice procedure under Rule 23(c)(2), and, therefore, the cost of identification must be borne by plaintiffs. However, even if the identification of class members had come up under the discovery rules, in the circumstances here present, the costs would have been charged to plaintiffs.**

The cases cited by plaintiffs (Pltf. Br. at 64-65.)

---

* Pltf. Br. at 59.

** See Main Brief of Oppenheimer Defendants at 27; Brief of Defendant-Appellant Oppenheimer Fund, Inc. at 15-17; Brief of Defendants-Appellants Edmund T. Delaney and Emanuel Celler at 4-6.

under the discovery rules were all decided prior to the adoption of Rule 33(c) which expressly affords a party protection from the burden of deriving or summarizing information contained in business records when the raw materials are available for examination, audit or inspection.

To the extent that plaintiffs' cases retain precedential value, they support defendants' position, and the prevailing rule, that the costs of refining and analyzing raw materials are to be borne by the interrogating party. Thus, in United States v. Nysco Laboratories, Inc., 26 F.R.D. 159, 162-63 (E.D.N.Y. 1960), the court did not require the defendants to analyze and summarize the written opinions of defendants' expert witnesses, as requested by plaintiff. Instead, the court merely directed defendants to furnish plaintiff "a description of the tests sufficient for identification. . . ." Similarly, in Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., 12 F.R.D. 531, 538 (S.D.N.Y. 1952), in order to answer plaintiff's interrogatories defendant would have been required to make extensive compilations and summaries. Although rejecting defendant's objections grounded upon the relevance of the information sought, the court stated (12 F.R.D. at 538):

> "This is not to say that defendant may not further reduce its task by supplying plaintiff appropriate documents containing the information sought in reasonably manageable form in lieu of answers."

American Oil Co. v. Pennsylvania Petroleum Products Co., 23 F.R.D. 680, 683 (D.R.I. 1959), is not relevant to the facts attending the instant matter. Unlike the identification of

class members herein, the court there found that the information sought would "undoubtedly be assembled" by the defendant prior to trial in preparation of its defense and so was not objectionable as burdensome.

Nor do the commentators cited by plaintiffs support their contentions. Plaintiffs' quotation of 8 Wright & Miller, Federal Practice and Procedure § 2218 at p. 659 (1971), is taken from a discussion of Rule 34, which governs the production and inspection of documents and things. In the case of computerized information, Professors Wright and Miller note that the document will usually be a printout, the principal form of expressing computer data, and, absent undue burden, the responding party may be required to pay the cost of making a printout of existing computer data in such party's possession. This is generally a nominal expense. However, the identities of the class members herein are not existing data subject to Rule 34. Plaintiffs seek to compel the defendant Fund to pay to create and implement original programs to scan the records and obtain the necessary information. As to situations of this sort, Professors Wright and Miller caution: "the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." Id. at 659. Thus, in commenting on Rule 33(c), Wright and Miller, in consonance with the prevailing view, state: "If the data is equally available to both parties, the party seeking the information should do his own re-

search." Id. at § 2174, pp. 552-53 (Emphasis supplied); accord, 4A Moore's Federal Practice ¶ 33.20 at p. 33-103 (2d ed. 1975).

The defendants have not sought to deny the plaintiffs access to the raw material from which the names and addresses of the members of the class can be ascertained. The defendants' transfer agent is willing to assume the administrative burden of culling the relevant names and addresses from this raw data. However, the defendants are entitled to be reimbursed for the expense incurred. Since adoption of Rule 33, the discovery rules may not be applied to impose upon the responding party the substantial cost of making a novel compilation from its raw data which is wholly unnecessary to such party's preparation of the case.

* * * *

Since the cost of identifying class members is an essential component of the notice process, the Federal Rules of Civil Procedure and recent decisions of the Supreme Court and this Court require that such costs be borne by plaintiffs. Even under discovery rules, in the circumstances here present, plaintiffs would be required to bear these costs.

POINT II

This Court Has Jurisdiction To Review The Order And Decision Of The District Court

A. The Right To Appeal Is Not Dependent On The New Standards Proposed By Plaintiffs.

The recent decisions of this Court and the United States Supreme Court decision in Eisen IV firmly establish the independent appealability of the parts of the order below concerning (1) allocation of the portion of notice costs relating to class member identification to the defendant Fund and (2) manageability of this action as a class action. Each such ruling satisfies the three-pronged test for the allowance of an interlocutory appeal, which has been consistently recognized by this Court. In re Master Key Antitrust Litigation, ______F.2d______ (2d Cir. Dec. 22, 1975), slip. op. Docket No. 75-7386, at 1163; Handwerger v. Ginsberg, 519 F.2d 1339 (2d Cir. 1975); Parkinson v. April Industries, Inc., 520 F.2d 650 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Herbst v. International Telephone & Telegraph Corp., 495 F.2d 1308 (2d Cir. 1974).

All of these cases were decided in the recent past and all affirm beyond any doubt that under 28 U.S.C. Section 1291 this Court has jurisdiction to review the rulings of the District Court as "final orders" where: (1) the order below

is "fundamental to the further conduct of the case;" (2) review of the order is "separable from the merits of the action;" and (3) the order is likely to cause "irreparable harm to the defendant in terms of time and money spent in defending a huge class action. . . ." E.g., In re Master Key Antitrust Litigation, supra at 1171.

Notwithstanding this Court's consistent application of the three-pronged test of appealability, plaintiffs now attempt to interject an amorphous, new fourth requirement, which would preclude appeals from a so-called "discretionary decision" and rulings "in a discretionary area."* The recent decisions of this Court recognize no such requirement.

In support of their new requirement, plaintiffs rely on the General Motors case. However, the Court did not there dismiss the appeal because the order below concerned matters of discretion. The right to appeal was denied because the three-pronged test had not been met in that the appeal required consideration of the merits of the action. General Motors Corp. v. City of New York, 501 F.2d 639, at 644-45. Indeed, in Parkinson v. April Industries, Inc., 520 F.2d 650, at 756, this Circuit, in discussing its General Motors decision, expressly declared that the appeal therein was denied because "the order was not 'separable from the merits.'"

Plaintiffs similarly misread Parkinson as relying upon the General Motors decision in dismissing an appeal on

---

* Pltf. Br. at 23, 26.

the grounds that it concerned discretionary matters. In Parkinson, as in General Motors, the decision was based on non-separability of the order from the merits. Parkinson v. April Industries, Inc., supra at 658. As recently as last December, this Court in In re Master Key Antitrust Litigation, supra at 1171, confirmed that its prior decisions applied the three-pronged test, and not, as plaintiffs claim, some other standard relating to the discretionary character of the order below.

Nor do the other decisions of this Court support plaintiffs' contentions. In Kohn v. Royall, Koegel & Wells, supra at 1099-1100, the appeal was denied because plaintiff "could reasonably be expected to continue the action in her individual capacity", and therefore the class action determination was not fundamental to the further conduct of the case. Similarly, in Handwerger v. Ginsberg, supra, the Court found that the elements of separability and irreparable harm were lacking.*

---

* The three-pronged test of appealability appears to have been first expressly adopted by this Court in 1974, in Herbst v. International Telephone & Telegraph Corp., supra at 1312. A number of the cases relied upon by plaintiffs were decided prior to that time. See, Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972); Donlon Industries, Inc. v. Forte, 402 F.2d 935 (2d Cir. 1968); Bancroft Nav. Co. v. Chadade Steamship Co., 349 F.2d 527 (2d Cir. 1965). The continuing precedential validity of these decisions is questionable in light of recent cases. In any event, none of these decisions appear to be grounded upon the discretionary character of the District Court's order.

The Supreme Court in Eisen IV did not examine the discretionary character of the order there at issue in affirming the right of appeal under Section 1291. The Supreme Court found that the order below imposing 90% of the notice costs on respondents constituted "a final disposition of a claimed right" and "involved a collateral matter unrelated to the merits of petitioners claim." Eisen IV, supra at 172.

Accordingly, it is submitted that where each element of the three-pronged test is affirmatively established, there is a right of appeal under Section 1291 and this Court's jurisdiction does not depend upon whether or not the order below was of a "discretionary" nature.*

B. The Order Of The District Court Allocating The Cost Of Class Member Identification To The Defendant Fund Satisfies The Tests For Appealability Under Section 1291.

It is evident that the order below allocating the costs of class member identification satisfies each element of the three-pronged test for the allowance of an interlocutory appeal. Main Brief of Oppenheimer Defendants at 44-47.

(1) The order is "fundamental to the further conduct of the case." It is uncontested in the record and the briefs of the parties that plaintiffs will not continue prosecution of

---

* In In re Master Key Antitrust Litigation, supra, the Court examined almost every case cited by plaintiffs herein, and reaffirmed the validity of the three-pronged test. The Court did not comment on the discretionary nature of the order appealed from.

this class suit if they are required to bear such costs. Plaintiffs' Brief corroborates the prior record in stating:

> "[T]he plaintiffs indicated that, if they were required to bear these costs, they could not continue prosecution of the action as a class suit."*

(2) Review of the order is "separable from the merits of the action." In reviewing the identification cost allocation, this Court is not called upon to consider any aspect of plaintiffs' underlying action.

(3) The order will cause "irreparable harm" to the defendants in terms of time and money spent in defending the action as a class action.

In all of plaintiffs' discussion of appealability, they do not once deny that the Court's order on notice costs satisfies all of the elements of the three-fold test. Their silence implies concurrence. Indeed, it is because these tests are satisfied that one can understand plaintiffs' attempt to validate the non-existent discretionary-area test discussed above.

A number of recent pronouncements of this Court underscore the right to appeal the District Court's ruling on the allocation of costs related to the class action notice. In Parkinson v. April Industries, Inc., 520 F.2d 650, at 657, the Court recognized the right of appeal under Section 1291 in the case of "'a finite and

---

* Pltf. Br. at 54. See also Appendix at A-144; A-147; A-149.

conclusive determination of judicial power' -- e.g., the power to shift notice costs and forego individualized notice. . . ." (Emphasis supplied.) As has been previously shown, this is precisely the issue presented for review herein. Commenting on the Eisen IV decision, Judge Friendly also expressed the view that the right of appeal is clear under facts very similar to those of the instant case:

> "[T]he order, compelling the defendants to pay for the sending of notices, was a classic case for application of the principal of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), since amounts so expended would be forever lost even if defendants ultimately prevailed on the merits. . . ." Parkinson v. April Industries, Inc., supra at 659 (Friendly, J., concurring).

The very danger mentioned by Judge Friendly is equally present in the instant case, if, as plaintiffs urge, the costs of identification are not taxable against plaintiffs, should defendants prevail on the merits. Pltf. Br. at 59.

It is submitted that this Court has jurisdiction to review the order of the Court below allocating the cost of class member identification to the defendant Fund.

C. The Order Of The District Court Determining That This Action Is Manageable As A Class Action Is Also Appealable Under Section 1291.

This Court has "not chosen to adopt a strict rule denying appealability for class action certification orders in all cases. . . ." In re Master Key Antitrust Litigation, (2d Cir. Dec. 22, 1975), slip op. Docket No. 75-7386, at

1170. The discretion of the trial court in determining whether the common question and manageability requirements have been met under Rule 23(b)(3) is not determinative of the issue of appealability. An appeal lies if the class certification order satisfies the requirements of the three-pronged test adopted by this Court.

Plaintiffs' do not dispute that the order of the Court below satisfies the requirements of fundamentality and irreparable harm.* Plaintiffs claim, however, that the test of separability from the merits, cannot be satisfied. To this end, plaintiffs make much of the difference between the complexities of proof of liability and damages, which defendants claim result in such a preponderance of individual questions as to render this action unmanageable, and the "standard discounts" which plaintiffs assert "could be applied in determining liability and computing damages." (Pltf. Br. at 28.) However, this Court is not called upon to consider the merits in reviewing questions concerning liability as it was in In re Master Key Antitrust Litigation, supra at 1173-75, where the Court noted the questions on liability really raised issues as to standing to sue, and consideration of the merits therefore was unavoidable. In the instant case, the merits

---

* Pltf. Br. at 27-28. The presence of these elements has been demonstrated in the discussion under subdivision B above pertaining to appealability of the determination of the Court below allocating the costs of identification to the defendant Fund and in the Main Brief of Oppenheimer Defendants at 45-47.

need not be considered, since the question is whether there are sufficient common questions of law and fact where the claim is based on an alleged failure of the Board of Directors to value fairly thirteen securities on some or all of 200 trading days during which approximately 121,000 class members purchased Fund shares, taking into account the manageability of such an action where even plaintiffs concede that the average claim does not exceed $15 per shareholder. We believe that these questions can be determined, just as they have been discussed by defendants,* without resort to a consideration of the merits.

Thus, in Herbst v. International Telephone and Telegraph Corp., 495 F.2d 1308, at 1314-16, this Court reviewed the determination of the District Court as to the predominance of common questions. Parkinson v. April Industries, Inc., supra at 658 n. 9, indicates that review in Herbst was appropriate because "there was an underlying question of the manageability of a class comprising an estimated 16,000 ITT stockholders." It is submitted that the instant case, in which there is a class of 121,000 members asserting relatively small claims that require tortuous proof of liability and damages, presents substantially more aggravated questions of manageability.**

---

* See Point III below and Main Brief of Oppenheimer Defendants at 37-43.

** See pp. 27-35, infra.

While we believe the authorization to maintain this action as a class action affords an independent basis for review, even if it be assumed it does not, this Court may properly review the manageability of this action in conjunction with its review of the order allocating a major part of the notice costs to defendant Fund. See, e.g., Deckert v. Independent Shares Corp., 311 U.S. 282, 287 (1940). Commenting on Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir.), cert. denied, 385 U.S. 971 (1966), where this Court exercised pendent appellate jurisdiction, Professor Moore states:

> "[T]he decision stands for the larger, very salutory proposition that once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." 9 Moore's Federal Practice ¶ 110.25[2] at p. 272 (2d ed. 1975).

The application of this rule of orderly judicial administration turns almost exclusively on the facts of each case. However, under facts similar to those here present, this Court has indicated its willingness to extend the scope of review to reach a class designation ruling. In Parkinson v. April Industries, Inc., supra at 658, Judge Friendly opined that a "class designation order . . . which also contains provisions requiring defendants to pay money or take other action not remediable on a review of the final judgment" is appealable under Section 1291.*

---

* Even the Third Circuit, which has expressed the view that class certification orders, standing alone, can never be appealable as "final orders," would appear to permit an appeal on this ground. Hackett v. General Host Corporation, 455 F.2d 618, 621-25 (3d Cir. 1972).

Indeed, the cost and method of notice and class certification should not be artificially separated. The method of effecting the notice required by Rule 23(c)(2) and the allocation of the costs thereof often have a direct bearing on whether a proposed class action will be manageable pursuant to Rule 23(b)(3). 3A Moore's Federal Practice ¶23.45 [4.-4] (2d ed. 1975); Eisen III, 479 F.2d 1005, at 1016-18. Unified review of these complimentary issues is, of course, conducive to sound judicial administration, and is fully in accord with this Court's review of manageability in Eisen III after its consideration of notice costs.

* * *

For the foregoing reasons it is submitted that the order and decision below concerning allocation of notice costs and directing that this action proceed as a class action are both appealable under 28 U.S.C. Section 1291.

POINT III

Class Action Certification Herein Does Not Meet The Requisite Standards Under Rule 23(b)(3)

A. The Predominance And Complexity Of Individual Issues Pertaining To Liability And Damages Render This Action Unmanageable As A Class Action.

In an effort to demonstrate that class certification herein is in accordance with the standards of manageability and predominance of common questions of law and fact required under Rule 23(b)(3), the plaintiffs have, with considerable ingenuity, managed to elucidate six alleged common questions of law and fact. They declare (Pltf. Br. at 7-8, 35-36.) that the "record" herein sets forth the following common questions of law and fact:

> "1. Whether the prospectuses issued by the Fund during the class period were false and misleading in that they failed to state that the Fund would purchase restricted securities;
>
> 2. Whether the prospectuses were false and misleading because of their failure to state the risks involved with respect to the purchase of restricted securities;
>
> 3. Whether the defendants used improper methods in valuing the restricted securities in the Fund's portfolio, including failing to apply proper discounts to the market prices of unrestricted securities of the same class;
>
> 4. Whether the prospectuses and periodic reports issued by the Fund were false and misleading in failing to disclose material information relating to the methods used by defendants in valuing restricted securities in the portfolio of the Fund;

5. Whether the prospectuses were false and misleading in stating that the Fund's shares were being offered at net asset value and failing to disclose that the net asset value of shares of the Fund was inflated as a result of the improper valuation of restricted securities in the portfolio of the Fund;

6. Whether the defendants' conduct violated the provisions of the Securities Act of 1933, the Securities and Exchange Act of 1934 and the Investment Company Act of 1940, and, if so, whether defendants are liable to the class as a result thereof."

Plaintiffs' reference (Pltf. Br. at 7.) to the "record", wherein these common questions are allegedly set forth, is to the affidavit of plaintiffs' counsel and not to any findings of the Court below.

Of the six items on plaintiffs' list, No. 3 concerns valuation, No. 6 takes in whether the conduct is illegal, and the remaining four deal with lack of disclosure. However, when the list is considered in conjunction with the complaint, it is clear that the crux of this case concerns valuation and not lack of disclosure. The gravamen of the action is the alleged failure by the Board of Directors of the Fund to determine in good faith the fair value of the restricted securities as required by Section 2(a)(41)(B)(ii) of the Investment Company Act of 1940. If the Fund's Board of Directors fairly valued the restricted securities in the Fund's portfolio, then the alleged omissions in the Fund's various publications are simply not actionable. If there were improper valuations, then plaintiffs in effect urge merely that defendants' improper conduct also is violative of alleged requirements to re-

port such improper conduct, thereby engendering the appearance but not the reality of a greater number of common questions.

In fact, common questions do not predominate. Since the gravamen of plaintiffs' claims is that the values attributed to the restricted securities held in the Fund's portfolio were not fair,* the alleged liability of the defendants may or may not arise on any one or more of the approximately 200 business days during the class period when Fund shares were sold to members of the class. Such liability obtains only if in the aggregate the restricted securities were overvalued on the date of individual purchases. The discrete questions inherent in "fair value" are, qualitatively and quantitatively, the predominant issues in this case, and such liability is primarily an individual and not a class issue.

These same discrete questions also predominate in connection with the determination of damages. Since Fund shares were sold to class members on each of 200 business days during the class period, proof and findings will be required as to the extent of overvaluation or undervaluation, if any, of each of thirteen different restricted securities on each such date.**

In an attempt to mitigate the complexity necessarily involved in these many discrete issues of alleged overvaluation,

---

* See Main Brief of Oppenheimer Defendants at 41-42.

** See Main Brief of Oppenheimer Defendants at 13.

plaintiffs urge, for the first time in these proceedings, that the extent of overvaluation for each restricted security can be established through the application of a standard "percentage discount" to the market price of unrestricted securities of the same type. (Pltf. Br. at 28, 42.) Thus, plaintiffs claim that, once the amount of a proper discount is established, it is simply a matter of arithmetic to determine the daily amount of overvaluation.

Such simplicity is not borne out by proceedings heretofore had herein. In 1975 plaintiffs responded to certain interrogatories, propounded by defendants in 1973, which, among other things, required plaintiffs to state their version of the "daily average true values" of each of the restricted securities in the portfolio of the Fund during the class period. Plaintiffs' answer to this interrogatory covers three pages listing 122 different valuations for these 13 restricted securities during various segments of the class period. (A161-63) Whether or not these 122 valuations are based on a standard percentage discount, we are unable to say.* Moreover, we have yet to determine whether this list of valuations is sanctioned by reputable securities analysts or is merely a statement of views held by plaintiffs or their counsel.**

---

* Defendants have not conducted discovery with respect to the methods used by plaintiffs in answering these interrogatories, since defendants did not receive such answers until October 16, 1975, after the date of the decision and entry of the order of the Court below.

** Pltfs. Br. at 9n, 48n.

Plaintiffs' present advocacy of a fixed percentage discount is also at variance with the principles for valuing restricted securities enunciated by the Securities and Exchange Commission in Investment Company Release No. 5847 (October 21, 1969), CCH Fed. Sec. Law Rep. ¶72,135 at pp. 62,318-19. This Release is cited by plaintiffs in connection with their assertion that "there is....applicable authority supporting plaintiffs' position that the defendants violated the provisions of the Investment Company Act. . . ." (Pltfs. Br. at 48n.) Contrary to plaintiffs views on discounting, the Release states (at p. 62,318): "it would be improper in valuing restricted securities automatically to maintain the same percentage discount (from the market quotation for unrestricted securities of the same class). . . ." We may question whether the complex, individual questions inherent in this action may be disregarded when the means now advocated by plaintiffs is condemned by the authority relied on by plaintiffs to establish liability.

Where, as here, there are 121,000 class members with only minimal amounts recoverable by the average account,* and individual questions relating to both liability and damages

---

* Even upon the basis of plaintiffs' estimates, the average class claim amounts to no more than $15. (Pltf. Br. at 43.) It is difficult to understand how plaintiffs, using their own figures, arrived at this estimate, however, since plaintiffs claim total damages of $1,500,000 to a class of 121,000 persons. The quotient of these figures is approximately $12.24. On defendants estimates, assuming as much as a 10% overvaluation throughout the period, damages to the average size account would range between $2.00 and $24.00, depending on purchase dates. See Main Brief of Oppenheimer Defendants at 40.

predominate over the few common questions with resulting unavoidable complexities of proof necessarily involved, it is submitted that this action is not manageable as a class action.

B. <u>Under The Circumstances Of This Case The Standards Of Rule 23(b)(3) Have Not Been Met</u>.

Contrary to plaintiffs' claim (Pltf. Br. at 37.), there are no cases in which a class suit was allowed to be maintained in the circumstances here present. As is clearly indicated by the Advisory Committee Notes on Rule 23, 39 F.R.D. 69,103, a securities fraud case may be unsuited for treatment as a class action even where there are common questions, if there will be material variation in the proof of liability because of variations in the representations made or degrees of reliance. Liability in the instant action is predicated on varying valuations in varying combinations ~~continuations~~ of one or more of 13 restricted securities on each of the 200 days when purchases were made. Valuation here presents individual questions which are not offset by common questions relating to the alleged failure to disclose such valuation.*

Accordingly, the cases cited by plaintiffs as to permissible securities or antitrust class actions are not controlling in the unique factual context of the instant action. They evidence quantitatively and qualitatively a greater predominance of common questions and do not entail the difficult

---

* See Subdivision A above and Main Brief of Oppenheimer Defendants at 42-43.

problems of manageability inherent in this suit. In most of the cases cited by plaintiffs liability was founded upon either a common course of misleading conduct or a series of interrelated cumulative misrepresentations which were uniformly directed to all or most members of the class. See, Green v. Wolf Corp., 406 F.2d 291, 298-301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (2,200 class members; misrepresentations set forth in three prospectuses); Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964) (8,000 class members); Dolgow v. Anderson, 43 F.R.D. 472, 488-91 (E.D.N.Y. 1968); Fischer v. Kletz, 41 F.R.D. 377, 380-83 (S.D.N.Y. 1966) (misrepresentations contained in seven financial statements). So, too, in Siegel v. Chicken Delight, 271 F. Supp. 722, 725-27 (N.D. Cal. 1967), a treble damage antitrust action on behalf of a class of 650 members, minor variants of a single contract, forming the "focal point" of the alleged violations, were signed by all class members. Escott v. Barchris Construction Corp., 340 F.2d 731, 733 (2d Cir. 1965) is not strictly relevant since the sole issue there was whether a motion to intervene in the action was time barred. However, in considering Rule 23(b)(3) standards, the Court there found that the prime question to be litigated was the falsity of a single registration statement.

Nor is Blackie v. Barrack, CCH Fed. Sec. L. Rep. ¶ 95,213 (9th Cir. 1975), determinative in the factual context of the instant case. Blackie concerned a substantial number

of fraudulent accounting practices resulting in the overstatement of earnings over a period of two years. The fraudulent accounting practices included not only overstated inventories, but also buried expense items and other costs, failure to establish adequate receivable reserves, failure to write off assets and failure to account for proposed discontinuation of product lines. The main thrust of defendants' argument there was that individual questions predominated because proof of the actionability of a current accounting representation would apply only to those who purchased shares while a particular financial report was current. This was rejected by the Court because of the common questions involved where throughout the period the numerous fraudulent accounting practices were uniformly followed. Such predominance is not present here.

As stated in our Main Brief (at 40), the aggravated administrative problems of this action coupled with the relatively small individual damage claims asserted herein are precisely the facts relied upon by this Court in dismissing the class action in Eisen III, 479 F.2d at 1017. Moreover, this action will engender numerous problems which courts have found to militate against class action status: (1) individual proof and findings as to damages; (2) complex individual determinations as to liability; (3) complexities arising from defenses, such as the setoffs asserted by defendants; and (4) the further difficulties of proof occasioned by a jury trial. See

Main Brief of Oppenheimer Defendants at 40-43.

* * *

It is submitted that the Court below erred in finding that the requirements of Rule 23(b)(3) have been met, and this action should not be permitted to be maintained as a class action.

CONCLUSION

The order of the District Court which is appealed from should be vacated and set aside and the District Court should be directed to enter an order denying plaintiffs' motion dated March 30, 1973 and dismissing the action as a class action; or, in the alternative, if this Court determines that the action is properly maintainable as a class action, so much of the order appealed from as concerns the cost of identifying class members should be vacated and set aside and the District Court should be directed to enter an order requiring plaintiffs to bear the cost of such identification as part of the costs of notice, pursuant to FRCP Rule 23(c)(2).

Respectfully submitted,

GUGGENHEIMER & UNTERMYER
Attorneys for Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash, Defendants-Appellants

Leon H. Tykulsker
Richard P. Ackerman

Of Counsel

Service of three copies of the within

Reply Brief is hereby admitted

Dated, New York, MAR 1 1976

Attorney for

COPY RECEIVED
MAR 15 1976
[illegible], PROSSITT & WOOD

Service of three copies of the within

Reply Brief is hereby admitted

Dated, New York, MAR 1 1976

3 COPY RECEIVED

Attorney for

MAR 15 1976
WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER

Service of three copies of the within

Reply Brief is hereby admitted

Dated, New York, MAR 1 1976

Attorney for

COPY RECEIVED
March 15, 1976
[illegible]